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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

SUN EXPLORATION AND PRODUCTION COMPANY, *et al.*,
Petitioners,

v.

JAMES R. CONNER, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

AMICUS CURIAE BRIEF OF THE GOVERNORS OF VARIOUS WESTERN STATES IN SUPPORT OF THE PETITIONERS

JOHN F. SHEPHERD
(Counsel of Record)
HOLLAND & HART
P.O. Box 8749
Denver, Colorado 80201
(303) 295-8309

(Additional Counsel listed inside cover)

R. PAUL VAN DAM
Utah Attorney General
236 State Capitol
Salt Lake City, Utah 84114

HAL STRATTON
New Mexico Attorney General
ROBERT G. STOVALL
Special Assistant to the
Attorney General
P.O. Box 2088
Santa Fe, New Mexico 87504

JOSEPH B. MEYER
Wyoming Attorney General
State Capitol, 200 West 24th
Cheyenne, Wyoming 82002

Counsel for Amici Curiae

TABLE OF CONTENTS

		PAGE
I.	INTERESTS OF THE AMICI	2
II.	THE PUBLIC INTEREST REQUIRES THIS COURT TO GRANT CERTIORARI AND DETERMINE THE ENVIRONMENTAL REVIEW PROCEDURES TO BE FOLLOWED BEFORE ISSUANCE OF ONSHORE FEDERAL OIL AND GAS LEASES	3
III.	CONCLUSION	7

TABLE OF AUTHORITIES

CASES

Andrus v. *Utah*, 446 U.S. 500 (1980) 6

Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. *Peterson*, 685 F.2d 678 (D.C. Cir. 1982) 4

Conner v. *Burford*, 848 F.2d 1441 (9th Cir. 1988) . . . 4

Mid-Northern Oil Co. v. *Walker*, 268 U.S. 45 (1925) . 2

North Slope Borough v. *Andrus*, 642 F.2d 589 (D.C. Cir. 1980) 4

Park County Resource Council v. *United States Department of Agriculture*, 817 F.2d 609 (10th Cir. 1987) 4

Sierra Club v. *Peterson*, 717 F.2d 1409 (D.C. Cir. 1983) 4

United States v. *New Mexico*, 438 U.S. 696 (1976) . . . 3

PAGE

STATUTES

Endangered Species Act, 16 U.S.C. §§ 1531-1543 (1982) 4

Energy Security Act, 42 U.S.C. § 8701(b)(1) (1982) . . 6

Mineral Leasing Act of 1920,
30 U.S.C. § 189 (1982) 2
30 U.S.C. § 191 (Supp. V 1987) 2

National Environmental Policy Act,
42 U.S.C. §§ 4321-4370 (1982) 4

REGULATIONS

Council on Environmental Quality regulations,
40 C.F.R. § 1508.28 (1987) 4

MISCELLANEOUS

Am. Pet. Inst., *Basic Petroleum Data Book* (Sept. 1988) 5

Am. Pet. Inst., *Monthly Statistical Report, December 1988* (Jan. 18, 1989) 5

Freyfogle, *Federal Lands and Local Communities*,
27 Ariz. L. Rev. 653 (1985) 3

Israel, *Reducing the Impact of State, Local, and Indian Taxes on Western Mineral Development*,
30 Rocky Mt. Min. L. Inst. 3-1 (1984) 2

U.S. Department of the Interior, *Public Land Statistics — 1987* (March 1988) 2

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Cecil D. Andrus, Governor of the State of Idaho, Norman H. Bangerter, Governor of the State of Utah, Garrey Carruthers, Governor of the State of New Mexico, Roy Romer, Governor of the State of Colorado, Stan Stephens, Governor of the State of Montana, and Mike Sullivan, Governor of the State of Wyoming (hereinafter "Western Governors"), by and through their respective Attorneys General or other counsel, respectfully submit this amicus curiae brief urging the Court to grant certiorari in this proceeding.[1]

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[1] The parties have consented to the Western Governors' participation in this proceeding as amici. Those consents have been filed with the Clerk.

I. INTERESTS OF THE AMICI

The Western States have a strong interest in the proper conduct of oil and gas exploration, development and production activities on federal lands within their boundaries. A substantial portion of lands within these states — approximately one-third of all lands within Colorado, Montana and New Mexico; one-half of all lands within Wyoming; and two-thirds of all lands within Idaho and Utah — is owned by the United States. U.S. Department of the Interior, *Public Land Statistics — 1987* at 5 (March 1988). These lands comprise a large portion of the over 70 million acres of public lands subject to federal onshore oil and gas leases. *Id.* at 58-63.

The principal issue presented in this case — the environmental review procedures to be followed before thousands of federal oil and gas leases are issued each year — is of vital interest to the Western Governors. Historically, the Western States have provided comments on the procedures, levels of leasing and standards proposed by the federal government in issuing federal oil and gas leases. These states also regulate many aspects of oil and gas exploration, development and production activities after leasing occurs, and are beneficiaries of revenues derived from the federal oil and gas leasing program. One-half of all federal oil and gas lease revenues are disbursed to the states;[2] state and local governments tax oil and gas activities conducted on federal lands;[3] and, as this Court has recognized, activities undertaken on federal lands

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[2] 30 U.S.C. § 191 (Supp. V 1987). That section provides that those monies are "to be used by such State and its subdivisions, as the legislature of the State may direct, giving priority to those subdivisions of the State socially or economically impacted by development of minerals leased under this Chapter, for (i) planning, (ii) construction and maintenance of public facilities, and (iii) provision of public service."

[3] 30 U.S.C. § 189 (1982). *See also Mid-Northern Oil Co. v. Walker*, 268 U.S. 45 (1925); Israel, *Reducing the Impact of State, Local, and Indian Taxes on Western Mineral Development*, 30 Rocky Mt. Min. L. Inst. 3-1 (1984).

often have a profound influence on state and local economies. *United States* v. *New Mexico*, 438 U.S. 696, 699 (1976).[4]

Moreover, two of the amici have participated in formulating and administering the federal onshore oil and gas leasing program. Idaho Governor Cecil D. Andrus served as Secretary of the Interior from 1976 to 1980. New Mexico Governor Garrey Carruthers served as Assistant Secretary of the Interior, Land and Minerals Management, from 1980-1984. Their experience in formulating and administering a federal oil and gas leasing program, together with the practical experience of the other Governors working with the federal leasing program, may benefit the Court in determining the proper environmental review procedures to be followed in ensuring both protection of the environment and timely development of natural resources.

This amicus curiae brief reflects the concerns of the Western Governors on the need for definitive resolution of which environmental review procedures should be followed for the issuance of onshore federal oil and gas leases. It does not reflect their position, or positions taken by their respective states, on the environmental review procedures applicable to other federal actions.

II. THE PUBLIC INTEREST REQUIRES THIS COURT TO GRANT CERTIORARI AND DETERMINE THE ENVIRONMENTAL REVIEW PROCEDURES TO BE FOLLOWED BEFORE ISSUANCE OF ONSHORE FEDERAL OIL AND GAS LEASES.

Petitioners have ably demonstrated (Petition at 7-24) that the three courts of appeals that entertain nearly all litigation concerning challenges to the issuance of onshore federal oil and gas leases are split as to the procedures that must be

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[4] The reliance of western states and localities on federal oil and gas activities is well documented. *See, e.g.*, Freyfogle, *Federal Lands and Local Communities*, 27 Ariz. L. Rev. 653 (1985).

followed to satisfy the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370 (1982) ("NEPA"), and the Endangered Species Act, 16 U.S.C. §§ 1531-1543 (1982) ("ESA"). The Tenth Circuit Court of Appeals has expressly affirmed the practice that has prevailed for nearly two decades since NEPA and ESA were enacted — "tiered" environmental review documents are prepared prior to leasing, exploration and development decisions. *Park County Resource Council* v. *United States Department of Agriculture*, 817 F.2d 609, 624 (10th Cir. 1987).[5] Without attempting to distinguish *Park County*, the Ninth Circuit Court of Appeals has expressly rejected that practice and has concluded that comprehensive environmental review documents addressing leasing, exploration *and* development activities must be prepared before federal oil and gas leases may issue. *Conner* v. *Burford*, 848 F.2d 1441 (9th Cir. 1988). The District of Columbia Circuit has affirmed historical, tiered decision-making in some cases and rejected it in others. *Compare Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears* v. *Peterson*, 685 F.2d 678 (D.C. Cir. 1982) (upholding environmental assessment limited to effects of mineral exploration activities on National Forest lands designated as wilderness; potential effects of development operations not considered), and *North Slope Borough* v. *Andrus*, 642 F.2d 589 (D.C. Cir. 1980) (upholding EIS that only considered effects of offshore oil and gas leasing, not development, on endangered species), *with Sierra Club* v. *Peterson*, 717 F.2d 1409 (D.C. Cir. 1983) (requiring EIS on potential effects of exploration *and* development for 28,000 acres of oil and gas leases covering National Forest lands being considered for wilderness designation).

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[5] The concept of tiering is described in the regulations of the Council on Environmental Quality, 40 C.F.R. § 1508.28 (1987). Tiering involves the coverage of general matters in broader environmental analyses with subsequent narrower environmental analyses concentrating on the issues specific to the proposal. Under tiering, issues that are not ripe for analysis are deferred for consideration in a subsequent analysis.

The failure of the courts to articulate consistent legal requirements has created substantial uncertainty. The procedures that must be followed in issuing leases may, for instance, be entirely different for national forests that virtually border each other but which are located in Wyoming (a Tenth Circuit state), and Montana and Idaho (both Ninth Circuit states). Indeed, the Targhee National Forest covers lands both in the Ninth Circuit (Idaho) and the Tenth Circuit (Wyoming). Moreover, because legal challenges to federal oil and gas leases may be prosecuted in the District of Columbia and because courts in that district have rendered inconsistent decisions on the viability of historical, tiered environmental documentation, the procedures that must be followed in issuing onshore federal oil and gas leases even within the Ninth and Tenth Circuit states are uncertain.

This uncertainty has manifested itself in predictable ways. Fewer federal oil and gas leases have been issued since the *Conner* decision was rendered and, for many national forests, leasing has virtually ceased. For example, in Region 1 of the U.S. Forest Service, which includes all of Montana and part of Idaho, the Forest Service issued leases covering 105,180 acres in fiscal year 1987, but did not issue *any* leases in fiscal year 1988.[6] This significant reduction in leasing will necessarily result in diminished oil and gas exploration, development and production on federal lands at a time when the nation's dependence on foreign oil is approaching all-time high levels of a decade ago.[7] And diminished oil and gas activity will adversely affect states and localities that rely heavily on those activities.

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[6] Telephone interview with W. Mark Webber, Leasable Minerals Section, U.S. Forest Service, Region 1 (Jan. 20, 1989).

[7] Dependence on foreign oil reached a high of 47.7% in 1977. Am. Pet. Inst., *Basic Petroleum Data Book* Vol. VIII, No. 3 at Section IX, Table 1 (Sept. 1988). In 1983, oil imports declined to 31.6% of total demand. *Id.* By December 1988, dependence on foreign oil had climbed back to 43.3%. Am. Pet. Inst. *Monthly Statistical Report, Dec. 1988* (Jan. 18, 1989).

A principal role of this Court is to reconcile inconsistent judicial decisions that substantially bear on matters of critical public policy. Whether the Court affirms or rejects the twenty-year practice of preparing tiered environmental review documents for federal onshore oil and gas leases, the interests of the parties and the public are served by resolution of the question. Accordingly, the Court should render a definitive decision in this case.

In their brief opposing the petition for certiorari, the federal respondents argue that while *Conner* is incorrect, review by this Court is premature. The Western Governors respectfully disagree. As noted above, oil and gas leasing in many national forests appears to have come to a halt since *Conner*; *no* leases were issued in Region 1 of the Forest Service in fiscal year 1988.[8] Moreover, if the required environmental review procedures are not decided by the Court in this case, it is likely to take another eight years of uncertainty, delay and costly litigation — not to mention lost revenues to the states and less domestic oil and gas production for the nation — before a subsequent case reaches this Court.[9] The public interest in administration of a federal onshore oil and gas leasing system that increases domestic oil and gas production,[10] while protecting the environment, requires that the Court address the important issues in this case. In *Andrus* v. *Utah*, 446 U.S. 500, 506 (1980), the Court granted certiorari to resolve "a significant issue regarding the disposition of vast amounts of public lands." The issues in *Conner* are no less significant, and cover far more public lands, than the issues presented in *Andrus* v. *Utah*. This Court should, therefore, grant certiorari.

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[8] Note 6 *supra*.

[9] The leases at issue in *Conner* were initially challenged by Mr. Conner, *et al.* in 1981.

[10] *See, e.g.*, Section 100(b)(1) of the Energy Security Act, 42 U.S.C. § 8701(b)(1) (1982), which declares that it is in the national interest to reduce dependence on foreign oil.

III. CONCLUSION

For the foregoing reasons, the Western Governors respectfully request the Court to grant a writ of certiorari in this case.

Respectfully submitted,

JOHN F. SHEPHERD
(Counsel of Record)
HOLLAND & HART
P.O. Box 8749
Denver, Colorado 80201
(303) 295-8309

R. PAUL VAN DAM
Utah Attorney General
236 State Capitol
Salt Lake City, Utah 84114

HAL STRATTON
New Mexico Attorney General
ROBERT G. STOVALL
Special Assistant to the
Attorney General
P.O. Box 2088
Santa Fe, New Mexico 87504

JOSEPH B. MEYER
Wyoming Attorney General
State Capitol, 200 West 24th
Cheyenne, Wyoming 82002

Counsel for Amici Curiae

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